COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of Global NAPs, Inc. against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts regarding dark fiber.

D.T.E. 98-116

BRIEF OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC., REGARDING THE APPROPRIATENESS OF

BELL ATLANTIC'S PROVISION OF

DARK FIBER ACROSS LATA BOUNDARIES

Introduction

In this docket, Global NAPS, Inc. ("GNAPS") seeks to enforce its rights under an interconnection agreement which requires Bell Atlantic ("BA") to provide Unbundled Dark Fiber to it. Joint Stipulation of Facts, ¶ 7, and Exhibit B attached thereto. GNAPS requested dark fiber from a location in the eastern LATA of Massachusetts to a location in the western LATA of Massachusetts. Id., ¶¶ 8-9. BA has raised three grounds for its refusal to provide the requested dark fiber:

(1) BA's leasing of dark fiber strands that cross LATA boundaries "could be construed as" BA offering interLATA telecommunications services, which is prohibited until FCC authorization is granted pursuant to 47 USC § 271, as inserted by § 151 of the Telecommunications Act of 1996 (the "1996 Act");

(2) Even if it is not a violation of the 1996 Act to provide dark fiber to a CLEC across LATA boundaries, BA does not have to do it in this case because GNAPs has not established that dark fiber is an unbundled element under the Supreme Court's recent ruling, AT&T Corp. v. Iowa Utilities Board, ___ U.S. ___, 1999 WL 24568 (1999) ("AT&T Corp."), and in any event must await the FCC's determination of this issue; and

(3) Even if it is not a violation of the 1996 Act to provide dark fiber to a CLEC across LATA boundaries, BA does not have to do it in this case because GNAPs' request does not comply with BA's requirement that one end of the requested dark fiber strands be part of a collocation arrangement.

At a procedural conference in this docket on January 22, 1999, it was agreed to postpone consideration of the collocation issue pending its consideration in another proceeding. Proc. Conf. Tr., p. 8.

Argument

BA's grounds for refusing to provide dark fiber to GNAPS as required by the interconnection agreement between them are so frivolous as to raise serious questions generally regarding BA's good faith in complying with its obligations to provide unbundled network elements to CLECs under its various interconnection agreements. It is clear on its face that the provision of dark fiber, a facility that – by definition – does not transmit information, to a telecommunications carrier, does not constitute the "offering of telecommunications for a fee directly

to the public." 47 U.S.C. 153(51), as inserted by the 1996 Act. BA's second ground, that it need not comply with the Department's December 4, 1996 Phase 3 Order in light of the Supreme Court's recent decision, is similarly disingenuous, if for no other reason than it is black letter law that a Department decision remains in full force and effect unless and until modified by the Department, reversed on appeal, or successfully challenged in a collateral attack. In any event, BA's second ground must fail because, the Department had authority to require that BA provide dark fiber as a UNE, the Department properly exercised that authority in its Phase 3 Order in Consolidated Arbitrations, and – as a result – BA and GNAPS entered into a binding contract under which BA must provide dark fiber as a UNE unless and until the contract is lawfully modified.

AT&T's arguments demonstrating the complete lack of merit in BA's grounds for refusal are set forth in more detail below.

Section 271 Of The 1996 Act Does not prohibit BA From Providing Dark Fiber To CLECs Across LATA Boundaries.

Contrary to BA's claims, the definitions that BA sets out in its brief on page 3 demonstrate that Section 271 does not prohibit BA from leasing dark fiber to a CLEC across a LATA boundary. Section 271 states in pertinent part:

Neither a Bell operating company, nor any affiliate of that Bell operating company, may provide interLATA services [with exceptions not relevant hereto].

As BA well notes in its brief, an interLATA service is defined by the 1996 Act to be "telecommunications between a point located in a [LATA] and a point located outside such area." BA Brief at 3. Thus, Section 271 prohibits BA from leasing dark fiber across a LATA boundary only if leasing dark fiber constitutes the provision of "telecommunications." As demonstrated below, it is clear beyond argument that leasing dark fiber does not constitute the provision of "telecommunications."

The 1996 Act defines "telecommunications" as:

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

47 U.S.C. 153(48), as inserted by the 1996 Act. Thus, telecommunications is not being provided unless information is being transmitted. When BA provides dark fiber to a CLEC, it is not transmitting information. The Department defined dark fiber as "a fiber optic strand that is in place in a network but is not connected to electronic equipment needed to power the line in order to transmit information." Consolidated Arbitrations, DPU/DTE 96-73/74, 96-75, 96-80/81, 96-83, and 96-84 (Phase 3 Order, December 4, 1996) at 42.

Thus, when BA provides dark fiber to a CLEC, it is not providing telecommunications to the CLEC. When BA provides dark fiber to a CLEC across a LATA boundary, therefore, it is not in violation of Section 271. As GNAPS noted in its complaint in this docket, if the mere provision of dark fiber across LATA boundaries constituted a violation of Section 271, then BA's provision of dark fiber to itself across a LATA boundary already violates Section 271. GNAPS Revised Motion For Complaint, filed December 18, 1998, ¶25.

The Department Should Not Refrain From Ordering BA To Provide The Dark Fiber Requested In This Case.

Although not initially given as a ground for its refusal to provide the dark fiber sought by GNAPS, BA now claims that, notwithstanding its obligation under its interconnection agreement with GNAPS and under the Department's Phase 3 Order, it need not provide (and the Department should not order it to provide) the dark fiber requested until the FCC determines whether dark fiber is a UNE that BA must make available to CLECs under the statutory "necessary" and "impair" standard discussed in AT&T Corp. BA Brief at 4-6. Indeed, BA contends that the Department does not even have the authority to require it to make any UNE available to CLECs. This new

argument by BA is particularly troubling, because it suggests that BA will refrain from offering any UNE until after the FCC has determined whether it must be made available. In any event, the Department should reject BA's position for the two reasons discussed below.

First, there is no reason for the Department to wait for the FCC to make such a determination because the Department has jurisdiction to do so. The Department has the authority to require BA to provide network elements identified by the Department even if they had not yet been so defined by the FCC. There is nothing in the 1996 Act that

would preclude such a determination by a state commission under state law. As the Department recognized when it found that Bell Atlantic must provide dark fiber as an unbundled network element, it had the authority to do so provided that its decision is consistent with the 1996 Act. See, Consolidated Arbitrations (Phase 3 Order) at 43. And, indeed, that is precisely what the Department did in Consolidated Arbitrations. The Department did not state that its decision was predicated on the authority granted to it under federal law. Rather, the Department ordered BA to provide dark fiber as a UNE, recognizing that it could do so as long as its decision was consistent with the 1996 Act. Id.

Second, in a letter to the FCC dated February 8, 1999, Bell Atlantic made a commitment that it will "continue to make available each of the individual network elements defined in the now-vacated FCC rules and our existing interconnection agreements." (emphasis added). It is uncontested that BA agreed to provide dark fiber in its interconnection with GNAPS. BA should not be allowed to shirk not only its legal obligation under the interconnection agreement, but also its commitment to the FCC made only two weeks ago. A copy of this Bell Atlantic letter to the FCC is attached to this brief.

Given that the Department has the authority to require BA to make dark fiber available as an unbundled network element, that the Department has already imposed such a requirement on BA and that BA has entered into interconnection agreements under which it has agreed to provide dark fiber, BA cannot now contend that it is not obligated to provide dark fiber. Under its existing obligations, it must indeed provide the dark fiber. The Department's Phase 3 Order remains in full force and effect unless and until it is stayed pending appeal, reversed on appeal, modified by a subsequent ruling by the Department or successfully challenged in a court of competent jurisdiction on collateral grounds. None of those events has occurred. Moreover, BA's contract requires it to provide dark fiber, and there has been no modification in the contract. BA has no ground for refusing to comply with its contractual and regulatory obligation to provide dark fiber to GNAPS in the present circumstance.

Conclusion

For the reasons stated above, the Department should order BA-MA to provide the dark fiber requested by GNAPS. In addition, the Department should order BA to comply with its obligations in all of its interconnection agreements to provide the UNEs specified in them.

Respectfully submitted,

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Jeffrey F. Jones

Jay E. Gruber

Joseph F. Hardcastle

Palmer & Dodge llp

One Beacon Street

Boston, MA 02108-3190

(617) 573-0100

Melinda T. Milberg

AT&T Communications, Inc.

32 Avenue of the Americas, Room 2700

New York, NY 10013

(212) 387-5617

Dated: February 24, 1999.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party on February 24, 1999.

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ATTACHMENT

Bell Atlantic Letter to the Federal Communications Commission

Dated February 8, 1999